

September 2, 2021

Via Email

Rick Vallarelli
Arlington Zoning Board of Appeals
51 Grove Street
Arlington, MA 02476

Attn: Christian Klein, Chair

**RE: ZBA Docket #3515 /Thorndike Place, Arlington, MA
Response to BETA Waiver List Review**

Dear Mr. Chairman and Members of the Board:

On behalf of the Applicant, Arlington Land Realty LLC, we are providing the following response to the peer review letter dated August 17, 2021 performed by BETA concerning select waiver requests as were included within the Applicant's Waiver Request as updated through August 3, 2021. To assist in the Board's review, the Applicant's response corresponds to the designation of Table 1 and Table 2 in the BETA review letter.

Table 1 – Waiver Requests for Zoning Bylaw Related to Civil/Site Design

Proposed Waiver: Title III: Town Bylaw, Article I, Sections 1 and 2 (Use of Streets for Construction or Demolition): Applicant requested waiver from these sections, noting that bonding requirements as required under the applicable bylaw provisions were not to be waived.

BETA: “We defer to the Board but note that the Applicant should provide a Construction Management Plan indicating project phasing and staging areas and anticipated impact to the public right of way.”

Response: Applicant intends to submit a Construction Management Plan, including reference to project phasing/timing and staging areas; impacts to the public right of way, including police details as indicated in Applicant's September 2, 2021 Response to Town Comment Letter. The Construction Management Plan would be submitted prior to the issuance of building permits.

Proposed Waiver: Title V (Regulations Upon Private Use of Property): Article 15, Sections 1-5 (Stormwater Mitigation)

BETA: “We believe this waiver is appropriate as the stormwater management system has been designed in accordance with MassDEP requirements and peer

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reviewed for compliance. Waiving this section means that the Applicant would not need separate approval for Stormwater from the Engineering Department prior to obtaining building permits. The ZBA decision would provide the approval.”

Response: No response required.

Table 2 – Waiver Requesting Summary for
Arlington’s Wetlands Protection Bylaw and Regulations

Proposed Waiver: Wetland Bylaw, Title V: Article 8, Section 2 and Wetland Regulations, Section 2(A)(5), 4(3) and 4(7) (Waiver of AURA as resource area, waiver of definition of AURA and waiver of definition of Area of Protection Under Bylaw to include AURA

BETA: “Section 2(A)(5): **“BETA does not recommend waiving AURA as a Resource Area Subject to Protection. The current design meets the intent of AURA’s presumption of significance and performance standards. Compliance with the regulations can be met. Therefore, a waiver is not required.**

The project and mitigation proposed in the *Thorndike Place Comprehensive Permit* plan set last revised August 2, 2021 and statements provided in their 8/3/21 List of Requested Waivers document acknowledge the AURA’s presumption of significant [sic] through providing the required 25-foot No Disturbance Zone and minimizing permanent site alterations in the 75-foot Restricted Zone. Mitigation provided by the proposed 2:1 floodplain compensation area located in the AURA that will include the restoration of native vegetation through elimination of invasive species and planting of native species, will provide a benefit to the AURA’s ability to protect the presumed interests it provides.

Section 4(3) Definition: Waiver from defining AURA. BETA does not recommend granting the waiver of this section. See comments above.

Section 4(7) Definition. Waiver from defining Area Subject to Protection Under the Bylaw. BETA does not recommend granting the waiver of this section. See Comments above.”

Response: Applicant agrees with BETA’s determination that the Project’s adherence to not alter the 25’ No Disturbance Zone, and the minimization of permanent alteration within the outer 75’ of the AURA combined with the 2:1 floodplain compensatory storage as mitigation and restoration of native vegetation through elimination of invasive species within the disturbed portion of AURA provide a benefit to the AURA’s ability to protect presumed wetland interests.

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Proposed Waiver: Wetland Regulations, Section 23 (Land Subject to Flooding, Definition and Performance Standards)

BETA: “BETA does not recommend granting the waiver of Section 23 – Land Subject to Flooding. The current design meets the intent of the resource areas’ presumption of significance and is in compliance with the performance standard. Therefore, a waiver is not required. Compliance with the regulations can be met.

The project proposed in the 8/2/2021 Thorndike Place Comprehensive Permit plan set and statements provided in their 8/3/21 List of Requested Waivers document acknowledge the resource areas’ presumption of significant [sic] by providing the 2:1 floodplain compensation for the proposed filing below the 100-year floodplain elevation.”

Response: Similarly, the Arlington Conservation Commission (“ACC”), within its August 23, 2021 7th Comment Letter, states, “[t]he Applicant should consider withdrawing the Wetlands Bylaw and Wetland Regulations waivers as they pertain to the AURA, Land Subject to Flooding, and Vegetation Removal and Replacement because the project as proposed (including 2:1 compensatory flood storage, vegetation mitigation, and habitat restoration), is in compliance with these Regulations.”

The Applicant agrees with BETA and the ACC that the Project as designed meets the regulations and performance standards pertaining to Land Subject to Flooding.

Proposed Waiver: Wetland Regulations, Section 24 – Vegetation Removal and Replacement Performance Standards

BETA: “BETA does not recommend granting of Waiver of Wetland Regulations Section 24 – Vegetation Removal and Replacement.

The Project is providing habitat restoration in the location of the 2:1 floodplain compensation area and also will be providing habitat restoration of the rear acreage that will remain undeveloped. Such restoration efforts should follow the guidance provided in the Regulations in Section 24.”

Response: In part, the requested waiver under Section 24 is what otherwise may be termed a “process” waiver. Specifically, Section 24(D) details the contents of an application to the Conservation Commission. As the Project is subject to the provisions of M.G.L.c.40B, §§20-23, the Board serves as the issuing authority of a master permit and subsequent applications to other local boards or commissions are not required¹. Within its Comprehensive Permit Application, the Applicant has proposed removal of vegetation within the AURA. The areas of vegetation removal and alteration do not impact the 25’ No Disturb Zone, nor is there any permanent structure within the AURA, with the

¹ As clarification, the Applicant will file a Notice of Intent (“NOI”) with the Conservation Commission; such filing is limited to review under the Wetlands Protection Act and its Regulations, at 310 CMR 10.00 et seq. The ACC’s review of the NOI is not conducted under its local Wetlands Protection Bylaw and Regulations, and as such would not review the NOI under Section 24.

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exception of the small portion of the extreme outer section of the AURA in the vicinity of the southwest edge of the garage and senior living building. Likewise, as documented by the BSC Wildlife and Habitat Assessment and confirmed by the Commission's former agent, Emily Sullivan, the area of vegetation removal is largely invasive species or otherwise degraded vegetation, consistent with Section 24(D)(1) and 24(D)(5) (removal of vegetation where vegetation is in decay/damaged or removal of invasive species). As noted by BETA, vegetative habitat restoration within the development parcel and the increase in floodplain compensation on a 2:1 basis provide a benefit to the AURA's ability to protect the presumed interests.

Similarly, the ACC in its August 23, 2021 comment letter confirms that "the project as proposed (including 2:1 compensatory flood storage, vegetation mitigation, and habitat restoration), is in compliance with these Regulations" and recommends withdrawal of the waiver requests. The ACC's acknowledgement of the project's compliance and recommendation of waiver withdrawal was similarly proposed within the Commission's review of the 1165 Mass. Ave Comprehensive Permit, where it recommended the Applicant withdraw a similar waiver request, noting that the proposed removal of invasive species and planting of native vegetation/enhancement of the resource area supported the proposed vegetation removal and replacement.

Proposed Waiver: Wetland Regulation's, Section 25 – Adjacent Upland Resource Areas.

BETA: "BETA does not recommend granting of Waiver of Wetland Regulations, Section 25-AURA. See Waiver of Sections 2(A)(5), 4(3) and 4(7) above."

Response: *BETA's discussion under Sections 2(A)(5), 4(3) and 4(7) include the following statements, "[t]he project and mitigation proposed in the Thorndike Place Comprehensive Permit plan set last revised August 2, 2021 and statements provided in their 8/3/21 List of Requested Waivers document acknowledge the AURA's presumption of significant [sic] through providing the required 25-foot No Disturbance Zone and minimizing permanent site alterations in the 75-foot Restricted Zone. Mitigation provided by the proposed 2:1 floodplain compensation area located in the AURA that will include the restoration of native vegetation through elimination of invasive species and planning of native species, will provide a benefit to the AURA's ability to protect the presumed interests it provides." (Emphasis added).*

It is unclear what is meant by BETA's recommendation to deny the waiver requested under Section 25 or to mean that a waiver is not required. The ACC's August 23, 2021 comment letter recommends the withdrawal of the AURA waiver request "because the project as proposed ... is in compliance." To the extent that BETA's comment confirms that the proposed work within the AURA has avoided adverse impact to the AURA and mitigated impacts through enhanced floodplain compensation in the AURA and removal of invasive species and reintroduction of native species within disturbed area, Applicant agrees.

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If the BETA comment is meant to state that the Applicant's proposed work in the AURA is consistent with the AURA bylaw provisions and that no waiver is required, the Applicant requests such clarification.

If the recommendation is such that the Applicant be required to submit an application to the Commission such for its review of the proposed AURA work, the Applicant objects to such condition subsequent recommendation as it is inconsistent with the Comprehensive Permit subsuming all local permits.

Proposed Waiver, Title V: Article 8, Section 11 (Bond Requirements)

BETA: "Given the proximity of the protected Bylaw Resource Areas within and adjacent to the Project as proposed, BETA recommends retaining the right of the Conservation Commission to require a performance bond."

Response: To clarify, because the Comprehensive Permit is a master permit, the Conservation Commission would have no jurisdiction to require a bond under the local wetlands bylaw. If such bond were required, it would have to be imposed by the Board.

With respect to the Applicant's request for the Board to waive the Section 11 bond requirement; Section 11 bond provisions are limited to protect against flooding conditions under the local wetlands bylaw, Section 11 is not an overall performance bond provision. As confirmed by both BETA and the ACC the Project's compensatory storage (2:1) has been engineered, peer reviewed and approved. Further, as determined by BETA, "[m]itigation provided by the proposed 2:1 floodplain compensation area located in the AURA that will include the restoration of native vegetation through elimination of invasive species and planting of native species, will provide a benefit to the AURA's ability to protect the presumed interests it provides."

The Section 11 bond for which a waiver is sought is not an overall bond to secure work in or adjacent to a resource area, but is limited to secure against flooding conditions. The Project's design, inclusive of the removal of invasive species within the development parcel and the 2:1 compensatory floodplain storage are relevant factors in support of the requested waiver. Should the Board reject waiving such bond, it is requested that any bond amount is narrowly limited to the purpose under Section 11.

Requested Waiver: Title V, Article 8, Section 16.B.11

BETA: "These fees are used by Conservation Commissions to fund review of Projects. BETA defers to the Conservation Commission to comment on whether the request to waive the entire consultant fee would be sufficient for this project."

Response: There is no need for the imposition of a consultant fee for the Commission's review of the Comprehensive Permit. By its language, Section 16.B.11 applies only to

SMOLAK & VAUGHAN LLP

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Notices of Intent, Abbreviated Notices of Intent or Requests for Determinations. To date, Applicant has only submitted an Application for a Comprehensive Permit. Similarly, the Board has retained BETA as its peer review consultant and the Commission has worked with the Board's peer reviewer to comment on the Project.

To the extent that the Commission has adopted rules consistent with M.G.L. c.44, §53G, at the time the Applicant files a Notice of Intent under the Wetlands Protection Act, the Commission may seek consultant fees. However, there is no recognized right or ability for the Commission to seek review fees of a Comprehensive Permit project.

We look forward to discussing these matters further with the Board at the hearing on September 9, 2021.

Sincerely,



Stephanie A. Kiefer

cc: Paul Haverty, Esq.
Jenny Raitt, Director of Planning and Community Development